

SARAH L. BENNETT
Claimant

STATE OF KANSAS¹
Respondent

STATE SELF INSURANCE FUND
Insurance Carrier

ORDER

APPEARANCES

RECORD AND STIPULATIONS

ISSUES

The ALJ awarded claimant a 5 percent functional impairment followed by a 25 percent work disability based upon a 16 percent wage loss and a 34 percent task loss.

¹ Claimant specifically worked for the Department of Corrections.

The respondent requests review of this Award and argues that claimant is entitled only to the 5 percent functional impairment as she has failed to demonstrate a good faith effort to find comparable post-injury employment.

Claimant argues she is entitled to a 67 percent work disability based upon her 100 percent wage loss and a 34 percent task loss. Claimant contends that until July 30, 2008 she was under the impression that she was still respondent's employee and had no obligation to search for work. Once respondent formally terminated her, she took steps to open her own daycare. Thus, her efforts to create her own business should constitute good faith justifying the use of her actual wages for purposes of computing her work disability under K.S.A. 44-510e(a).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The Board finds that the ALJ's Award sets out findings of fact and conclusions of law that are detailed, accurate, and supported by the record. The Board further finds that it is not necessary to repeat those findings and conclusions in this order. Therefore, except for claimant's task loss the Board adopts the ALJ's findings and conclusions as its own as if specifically set forth herein.

The single issue in dispute in this appeal is the nature and extent of claimant's impairment as a result of her August 30, 2006 accident. Claimant suffered a low back injury which was treated conservatively. The primary treating physician, Dr. Paul Stein, examined claimant on a number of occasions and rated her at 5 percent² while claimant's examining physician, Dr. Fluter, assigned an 8 percent. The ALJ noted that Dr. Fluter based his opinion on the "range of motion model" of the *Guides*, but did not measure claimant's range of motion in order to differentiate her impairment under the categories provided under the *Guides* Diagnosis Related Estimate (DRE) categories II and III for lumbar injuries. He also noted that Dr. Fluter disregarded claimant's positive Waddell's findings, present on her first examination with him, in an effort to bolster his 8 percent assessment. In contrast, Dr. Stein examined claimant a number of times and ultimately concluded she bore a 5 percent permanent partial impairment as her low back condition fell precisely within the DRE II category of 5 percent.

The ALJ was more persuaded by the opinions expressed by Dr. Stein and so is the Board. The 5 percent permanent partial impairment to the whole body is affirmed.

² American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* and ratings are to the whole body unless otherwise noted.

The ALJ then considered the claimant's request for permanent partial general (work) disability. Permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a), which provides, in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But this statute must be read in light of *Foulk* and *Copeland*.³ In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e, that a worker's post-injury wages should be based upon the ability to earn wages rather than actual wages being received when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury. If a finding is made that a claimant has not made a good faith effort to find post-injury employment, then the factfinder must determine an appropriate post-injury wage based on all the evidence before it.

As noted by the ALJ, claimant is not working, nor looking for work other than taking steps to begin her in-home daycare business. No financial information has been provided with respect to that enterprise. Jerry Hardin testified that claimant was capable of earning \$300 per week (yielding a 41 percent wage loss) while Dan Zumalt testified that claimant was capable of earning wages equal to or greater than 90 percent of her preinjury wage. Neither of these individuals' testimony was particularly compelling and valid criticism can be lodged at both. For example, Jerry Hardin did not perform any vocational testing during his interview and he did not consider claimant's transferable job skills in coming to his opinions regarding her capacity to earn wages. And Dan Zumwalt, who had used statistics to determine claimant's capacity to earn wages post-injury, did not perform any labor market survey to determine whether there were actual jobs available in claimant's geographical area at the wage he had concluded she could earn.

³ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995); *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

The ALJ expressed “difficulties with both approaches” taken by these vocational experts and in the end, he found a 16 percent wage loss. The Board has considered the evidence on this issue as well as the parties’ arguments and concludes the ALJ’s finding of 16 percent wage loss should be affirmed.

With respect to the task loss component of the equation, the ALJ gave “equal weight to the opinions of the testifying physicians to arrive at a 34% task loss”.⁴ After considering the record as a whole, the Board affirms the ALJ’s approach but modifies the ultimate percentage to 31 percent, a figure which accurately represents an average of the three task loss opinions. Accordingly, the claimant is entitled to a work disability of 22.5 percent based upon her 31 percent task loss and her 16 percent wage loss effective July 30, 2008, the date respondent terminated her employment.

The balance of the Award is not at issue and thus is affirmed in all respects.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated December 12, 2008, is affirmed in part and modified in part as follows:

The claimant is entitled to 2.86 weeks of temporary total disability compensation at the rate of \$336.52 per week or \$962.45 followed by 20.75 weeks of permanent partial disability compensation at the rate of \$336.52 per week or \$6,982.79 for a 5 percent functional disability followed by 76.78 weeks of permanent partial disability compensation at the rate of \$336.52 per week or \$25,838.01 for a 23.50 percent work disability, making a total award of \$33,783.25.

As of April 1, 2009 there would be due and owing to the claimant 2.86 weeks of temporary total disability compensation at the rate of \$336.52 per week in the sum of \$962.45 plus 55.89 weeks of permanent partial disability compensation at the rate of \$336.52 per week in the sum of \$18,808.10 for a total due and owing of \$19,770.55, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$14,012.70 shall be paid at the rate of \$336.52

All other findings and conclusions contained within the ALJ’s Award are hereby affirmed to the extent they are not modified herein.

⁴ ALJ Award (Dec. 12, 2008) at 8. Dr. Fluter opined claimant had a task loss of 52 percent based upon Mr. Hardin’s job task list while Dr. Stein opined that claimant had a task loss of 16 percent based upon Mr. Zumalt’s corresponding list. Dr. Stein also reviewed Mr. Hardin’s list and assigned a task loss of 24 percent. An average of these three opinions is 31 percent, not 34 percent as referenced by the ALJ in the Award.

IT IS SO ORDERED.

Dated this _____ day of March 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James B. Zongker, Attorney for Claimant
Richard L. Friedeman/Christopher J. Shepard, Attorneys for Respondent/Ins. Carrier
Bruce E. Moore, Administrative Law Judge